



STATE OF WISCONSIN

PERSONNEL COMMISSION

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WILLIAM R. HIGGINS,
 Complainant,

v.

Executive Director, WISCONSIN
 RACING BOARD (Chairperson,
 WISCONSIN GAMING COMMISSION),
 Respondent.

Case No. 92-0020-PC

* * * * *

INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission on a claim of unlawful termination of employment. The following findings of fact, conclusions of law, discussion and order are based on a hearing held before Donald R. Murphy, Commissioner. Any findings of fact in the discussion are adopted as such.

FINDINGS OF FACT

1. William R. Higgins, appellant, began employment as a Board Steward 2 with the Wisconsin Racing Board, respondent, on May 9, 1990.
2. The Wisconsin Racing Board is an administrative agency of the state of Wisconsin and is charged with the duty of regulating racing and pari-mutuel wagering.
3. Prior to beginning his duties as a Steward, Higgins, along with other employees, participated in staff orientation, where he received training regarding his position and the statutes and rules he would be required to administer.
4. After a week and a half of orientation, Higgins, with other staff members, went to the Dairyland Greyhound Park race track for licensing and additional training prior to opening.
5. Higgins worked and remained at Dairyland Greyhound Park during his tenure with the Racing Board.
6. On March 11, 1991, Higgins assumed the duties of Presiding Board Steward 2.

7. As Presiding Board Steward, Higgins was in charge of the overall operations of the track. He supervised the track employees during the race meetings, determined the official order of finish in each race and verified the race prior to submitting the information for payout and public posting.

8. Also, Higgins was responsible for interpreting and enforcing the rules of racing and racing related matters at the racetrack.

9. During this same period - March and April of 1991 - the Board's Conflict of Interest, Work Rules and Code of Ethics were circulated and acknowledged by the Board's staff. A formal employee handbook which included work rules was first published in February of 1992.

10. By letter dated March 22, 1991, Higgins, as Presiding Board Steward, was reprimanded by the Board for being responsible for the incorrect numbering (blanketing) of two greyhounds on March 13, 1991.

11. On March 13, 1991, Higgins was the Presiding Board Steward at the Dairyland dog racing track. As presiding steward, he was responsible for the overall operation of races, including proper blanketing of the dogs. On this day, in one race, the blankets of two greyhounds were switched, resulting in an incorrect call of the race and later, a payout to both the official winners and the actual winners. Two paddock judges had primary responsibility for performing blanket checks. Blanket checking is in the position descriptions of all Board Stewards. On this day Higgins and Virginia Olson were on duty as Board Stewards. Based on training and other information provided by management, appellant reasonably believed that checking the color of blankets was not a routine function for stewards, and that spot checking by stewards was acceptable to management.

12. By letter dated October 8, 1991, Higgins, as Presiding Board Steward, was reprimanded by the Board for violating Board rules by permitting the weigh-in of greyhounds and the commencement of official schooling racing (races on which no wagering is conducted) without the presence of a Board veterinarian.

13. Board rules required the presence of a state veterinarian at the race track prior to commencement of weigh-in of official schooling and betting races. Based on discussions with management, appellant reasonably believed it was management's position that while it was preferable to have a veterinarian present before the weigh-in for a schooling race, it was not

absolutely required. Board management did not make it clear to the part-time veterinarians hired for this purpose, that late arrival due to emergencies was unacceptable.

14. Higgins filed a written appeal of his October 1991 letter of reprimand with the Board Personnel Director in accordance with Board grievance procedures.

15. While Higgins had several conversations with the Board's Personnel Director, Linda Minash, who, in turn talked with the Board Deputy Director, no written response to Higgins's appeal was ever provided Higgins by the Board.

16. Minash's last conversation with Higgins about his appeal occurred shortly before Higgins left on leave. Minash informed Higgins that she agreed with the reprimand.

17. On November 25, 1991, Higgins and two other stewards Joseph Paulick and Paul Clegg were in the judge's stand at Dairyland. The fourth race at Dairyland on November 25, 1991, was close. Higgins, as Presiding Steward, following procedure, ordered a photograph of the finish. After reviewing the photograph with a magnifying glass, the three stewards reached a consensus regarding the order of finish in the race.

18. After the races on November 25, 1991, Higgins sent his immediate supervisor, Scott Scepaniak, the Board Deputy Director, an electronic mail message advising him of the fourth race.

19. On December 2, 1991, Higgins sent his weekly report to Scepaniak. In the report Higgins reported the request for photographs in the fourth race on November 25, 1991.

20. Shortly after receiving Higgins's E-Mail message, Scepaniak began an investigation of the matter. The assigned investigator talked with Higgins on December 4, 1991, and Higgins gave him a statement at that time.

21. The investigation of the fourth race on November 25, 1991, was concluded in late December of 1991. It was determined that the official call had been incorrect, and payouts to the public were made based on the correct order of finish.

22. Higgins's handling of the fourth race on November 25, 1991, including his decision not to take measures to change or correct the results

after the order of finish had been posted as "official" did not violate respondent's rules or policies.

23. On the morning of January 3rd, a Friday, Scepaniak gave Higgins a letter from the Board informing him that the Board was considering taking disciplinary action against him and that it would conduct a predisciplinary conference on Monday, January 6, 1992 at 11:00 AM.

24. In the predisciplinary conference notification letter, Higgins was advised that he could respond to the allegations orally or in writing, and that he was suspended with pay until resolution of the matter.

25. On January 13, 1992, Higgins was notified by letter dated January 12, 1992, that his employment with the Board was terminated effective January 13, 1992.

26. On January 29, 1992, Higgins appealed his termination of January 13, 1992 by the Board to the Personnel Commission.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.44(1)(c), et. seq.

2. Respondent has the burden of proving to a reasonable certainty by the greater weight of credible evidence there was just cause for imposition of discipline and for imposition of the particular discipline.

3. Respondent has failed to establish just cause for imposition of discipline and for imposition of the particular discipline.

4. Respondent's reliance on a prior reprimand with respect to which a grievance was pending was not inappropriate.

5. Respondent did not violate appellant's due process rights with respect to the amount of time between the notice of and the predetermination hearing.

DISCUSSION

The issues in this case are:

1. [w]hether the pre-disciplinary procedure followed was adequate with respect to the amount of time between notice and hearing;

2. whether there was just cause for the imposition of discipline:

a. whether respondent improperly relied on a prior reprimand with respect to which an appeal was still pending.

b. whether the discharge constituted an excessive penalty.

In cases involving the termination of employees with permanent status in the state classified civil service, the appointing authority, i.e., state agency, has the burden of proving that the discharge was for just cause and to sustain its action, the appointing authority must prove to a reasonable certainty, by the greater weight of credible evidence, that the discharge was for just cause. See Bell v. Personnel Board, 259 Wis 602, 49 N.W. 2d 889 (1951).

In the present case before the Commission, the respondent, Wisconsin Racing Board, stated in its termination letter to appellant Higgins that the basis of his discharge was due to his failure to "uphold the provisions of the Board's Administrative Rules." The Board referred to these incidents:

(First incident:)

"On Monday, November 25, 1991, after the conclusion of the fourth race and reviewing of the photo, an incorrect order of finish was posted and declared official. The investigation also revealed the incorrect order was brought to your attention yet no corrective measures, as specified by the Board's rules, were implemented to correct the error."

(Second incident:)

"In a prior letter of reprimand to yourself of March 22, 1991 an incident occurred in which the incorrect order of finish was declared official as a result of a blanket switch. At that time when the error was discovered and under the direction of Board Staff, the correct procedure was implemented to ensure the proper mutuel payouts were provided to the public."

(Third incident:)

"A second letter of reprimand was issued on October 8, 1991 for your failure as Presiding Board Steward to enforce the Board's administrative rules. This letter resulted from you permitting the weighing-in of greyhounds and the commencement of official schooling without the Board Veterinarian in attendance. During the course of the schooling program a greyhound was seriously injured and did not receive immediate medical attention due to the veterinarian's absence. Consequently, the greyhound needlessly suffered before being humanely euthanized as a result of your failure to enforce the Board's rules."

Finally, the Board stated that it was appellant's "continued failure ... as an employe ... to perform the duties and responsibilities as assigned" and to enforce the applicable Board rules which caused his discharge.

The incidents referred to by the Board in its termination letter to Higgins will be discussed in the order they occurred.

The evidence shows that on March 13, 1991, Higgins was the Presiding Board Steward at the Dairyland dog racing track. As presiding steward, he was responsible for the overall operation of races, including proper blanketing of the dogs. On this day, in one race, the blankets of two greyhounds were switched, resulting in an incorrect call of the race and later, a payout to both the official winners and the actual winners. Two paddock judges had primary responsibility for performing blanket checks. Blanket checking is in the position descriptions of all Board Stewards. On this day Higgins and Virginia Olson were on duty as Board Stewards. Higgins testified that based on the training he received, checking the colors of blankets was not a routine function for stewards. Higgins also testified that on more than one occasion, he discussed this subject with his supervisor Mr. Scepaniak, and from those discussions believed blanket checking was not among the most important functions for him as Presiding Steward. Higgins's testimony was corroborated by Olson. She testified that she too was trained by then Presiding Board Steward Len Davis, who did not view blanketing as even a routine function. Also, she testified that she was present one night on the roof at the track when Higgins and Mr. Scott Scepaniak, their immediate supervisor and Board Deputy Director, were discussing blanketing, and heard Higgins tell Scepaniak that they were not checking blankets all the time. Based on Scepaniak's response to Higgins, it was her impression that spot checking of blankets was acceptable. Olson also received a written reprimand for the March 13th incident.

Higgins was disciplined next on October 8, 1991 as a consequence of his failure to have a veterinarian present during an official schooling race on September 30, 1991. Board rules required the presence of a state veterinarian at the race track prior to commencement of weigh-in of official schooling and betting races. Higgins testified that based on discussions with Scepaniak and Dr. Otte, the Board Veterinarian, although not preferred, they could proceed

with the weigh-in without the presence of a veterinarian for official school races.

Scepaniak testified that he never gave Higgins or Dr. Otte such approval. Dr. Otte, who recruited, hired and scheduled the part time veterinarians, testified that several times she pointed out to Scepaniak that the part time veterinarians were private practitioners and that they would have emergencies or something that would sometimes cause them to be late. Also, she testified that Scepaniak responded by saying, "Well, it better not happen," and that she advised Higgins of her discussions with Scepaniak. Dr. Mana, the part time veterinarian hired by Dr. Otte, who arrived late at the track on September 30, testified that Dr. Otte, at the time of his hire, was aware that an emergency might cause him to arrive late at the track and that neither she nor anyone else from the Board indicated to him that was not acceptable.

Virginia Olson, a Board Steward for the Board from May of 1990 to June of 1991, testified that based on discussions with staff members Higgins, Otte and Ron Sultenmeir, the General Manager of Dairyland race track, she believed the Board tacitly accepted the occasional late arrival of the part time veterinarians.

Based on the testimony, it is clear there was confusion among the staff regarding the application of the rule requiring veterinarians present at the weigh-in. Also, it is clear that the Board Veterinarian, who scheduled the part-time veterinarians, failed to inform them of Scepaniak's mandate.

The incident which culminated in the termination of Higgins occurred on November 25, 1991. Higgins, as Presiding Steward, with Associate Stewards Joseph Paulick and Roy Clegg, viewed a close race. Following procedure, a photo of the finish was reviewed by them and afterwards they unanimously reached a decision regarding the order of finish of that race. This decision was declared official. The next day Higgins sent Scepaniak a message advising him that the official order of the race might be questioned. Subsequently, Scepaniak ordered an investigation of the incident. The investigation was concluded in late December and it was determined that the call was incorrect. In January of 1992, the error was corrected and pay outs to the public were ordered on the corrected order of finish.

The Board believes that Higgins violated a rule of the Board when he failed to change the order of finish after it had been officially posted. While

the Board, in Higgins's termination letter, did not specify the particular rule violated by Higgins on November 25, 1991, applicable Racing board rules are as follows:

Race 7.10(2) Stewards

- (a) The stewards shall supervise the race meeting to which they are assigned including the actions and decisions of all racing officials in carrying out their duties. In all cases of a conflict the decisions of the stewards shall control. The stewards shall be responsible for enforcing ch. 562 Stats. and the board's rules.
- (b) There shall be three stewards for each race meeting, two of whom shall be appointed by the board and one who shall be nominated by the association for approval by the board.
- (c) Should any situation occur which may not be covered by the rules of racing, it shall be determined by the stewards in conformity with custom and usage in the industry and in the best interest of racing.

* * *

- (i) The stewards shall determine the finish of the race by the relative position of the muzzles of the greyhounds. In cases where the muzzle is off, hanging or in the mouth the stewards shall consider the relative position of the nose of the greyhound.
- (j) The stewards shall display the numbers of the first three greyhounds in each race in order of their finish. If the stewards differ in their placing, the majority shall prevail. Nothing in these rules shall be construed to prevent the stewards from correcting an error before the display of the sign "official."

* * *

RACE 8.13 Official Sign Final. Once the "official" sign has been posted, no changes may be made to the order of finish for purposes of mutuel payouts. Any ruling of the stewards regarding the award of purse money or order of finish for purposes of grading made after the "official" sign has been posted shall have no bearing on the mutuel payout.

Race 8.14 Errors in Posting Payouts. If an error is made in posting the payout figures on the display devices, it shall be corrected by the association or totalizator system licensee. Only the correct amounts shall be used by the association in the payout regardless of the error on the display devices. If it is impossible to correct the posted payout because of equipment failure, the association shall cease all cashing of winning tickets and a statement shall be made by the association over the public address system stating the facts and corrections. The association shall be responsible for any overpayment or underpayment and shall be required to submit a report to the director within forty-eight hours after each occurrence. Any underpayment shall be remitted by the association to the board within forty-eight hours after the close that race day.

In support, Mr. Scepaniak testified to a prior incident, where blanket switching resulted in the wrong call of the order of finish and a double payment. However, Scepaniak also testified that he and Andrew Hodorowicz, director of Pari-Mutuels Operations, were present at this event and that after a lengthy discussion with Higgins and several other staff members in his office, it was decided to also make a payout on the actual order of finish. Higgins testified that nothing occurred during that incident, including discussions with Scepaniak, which caused him to believe he, as Presiding Steward, had authority to change an official order of finish and to direct payout of the correct order of finish.

In discipline cases the two issues presented are: whether the greater weight of credible evidence shows that the disciplined employee was guilty of the misconduct cited by the appointing authority and whether the misconduct constitutes just cause for the particular discipline. Bell v. Personnel Board, 259 Wis 602, 49 N.W. 2d 889 (1951). The test for "just cause" defined by the court in State ex rel. Gudlin v Civil Service Comm., 27 Wis 2d 77, 87, 133 N.W. 2d 799 (1965) is as follows:

...one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works...

In regards to the Board's claim of misconduct on November 25, 1991, Higgins contends that he did not violate the Racing Board's rules when he did not change the order of the finish after the race had been posted as official. Higgins had been involved in an earlier incident, March 13, 1991, where the wrong order of finish resulted in a double payout. Higgins testified that Scepaniak and Hodorowicz made the decision to pay ticket holders of the actual winners in that instance. And he believed only Racing Board directors had such authority. Oppositely, Scepaniak testified that he discussed the Board rule Race 8.14 with Higgins during the resolution of the March 13th incident, that Higgins understood that Race 8.14 governed the situation and that he (Higgins) had authority to implement and pay both ways.

Scepaniak also testified that previously following a wrong order of finish at the Fox Valley racing facility, the appropriate procedure for handling such errors was discussed at a meeting of the stewards, which was

attended by Higgins. Higgins testified that he recalled the steward's meeting following the Fox Valley incident, but did not recall any discussion during that meeting or subsequent meetings regarding procedure for handling wrong order of finishes declared official. Higgins's understanding of this rule was shared by counterpart Marlene Johnson, the Presiding Steward in the Fox Valley incident, who in a report of a similar incident occurring August 20, 1991, wrote indicating that she was of the understanding that once the order of finish was declared "official" it could not be changed by the Presiding Steward.

Appellant's Exhibit 12

As we view the evidence in the November 25, 1991 incident, it is undisputed that all three stewards reached a unanimous decision after viewing photos of the fourth race. Mr. Paulick, one of the stewards, testified: "No one clearly stated that he would like to continue to review the photo or change it." On November 27th Paulick reviewed a video of the finish of the race and decided their call was wrong. He sent an electronic message to Scepaniak stating that they (the stewards) had blown the call, whereupon Scepaniak began an investigation which was concluded in late December of 1991. Higgins testified that he never believed he made the wrong call until Saturday, January 4, 1992, two days before his pre-disciplinary hearing.

As will be discussed below, the Commission does not agree with respondent's interpretation of these rules. However, even assuming that Board rule Race 8.14 gives the Presiding Steward authority to correct an official wrong order of finish of a race by also ordering a payout for the actual order of finish, the question would remain as to whether Higgins's conduct violated that rule. Based on the record it is not clear that that is the case. The evidence is unclear as to when Higgins discovered the incorrect order of finish was posted. Although the record shows that after the race another staff member questioned the call, the three stewards, who were the only staff there authorized to make the decision, remained in agreement about the order of the finish as posted. Also, the record does not indicate that Higgins's associate stewards ever advised him that they believed they made the wrong call. The record only shows that Higgins was first made aware of associate steward Paulick's disagreement with the call on January 3, 1992 when he was provided attachments to his letter of suspension and notice of pre-disciplinary hearing

on January 6, 1992. And at that point, Higgins no longer had authority to continue any Board business.

We turn now to the question of whether the Board's Rules gave Higgins authority to correct a wrong order of finish after it's declared official and to order a payout of the winners of the official order of finish and the actual order of finish, assuming he had sufficient notice that a steward disagreed with the official call. It is undisputed that under Racing Board rule Race 7.10 (2)(c)(i) & (j), stewards are responsible for determining the order of finish of a race and that they can correct an error before the race is posted as "official." It is also undisputed that under Board rule Race 8.13, once the race is posted as "official," no changes can be made to the order of finish for purposes of payout. The dispute is whether Board rule Race 8.14 gives the presiding steward authority to correct a wrong call of order of finish by directing a payout to the actual winning ticket holders. The Commission believes that it does not.

Racing Board rule Race 8.14 addresses errors made in posting payout figures and gives the association or the totalizator systems license authority to make the correction on the display devices or, if there is equipment failure, announce the corrections over the public address systems. Further, this rule states that: "only the correct amounts shall be used by the association in the payout regardless of the error on the display devices." No mention is made of stewards, wrong call of order of finish, or payout of "official" order of finish and actual order of finish. Consequently, it is the opinion of the Commission that the plain language of this rule does not provide for a presiding steward to unilaterally order payouts to the actual winners after posting "official" winners of a race. Therefore, the Commission does not believe that respondent established that Higgins violated the Rule. Furthermore, based on the record, the Commission does not believe Higgins was explicitly advised of respondent's interpretation of the Rule.

Regarding the March 13, 1991 and September 30, 1991 events previously discussed, in both instances Higgins was not primarily responsible for monitoring the activity for which he received a reprimand: In the first incident, the two paddock judges were directly responsible for proper blanketing of the dogs. In the second incident, the state veterinarian was directly responsible for the presence of a veterinarian at the start of each

race. Higgins was reprimanded for these rule violations because as presiding steward he had overall responsibility for the operation of the races at this track. He contends that respondent should not have relied on the second reprimand because a grievance was still pending. However, respondent had no formal grievance procedures at the time, and since he was given a hearing on this charge by the appointing authority as part of the January 6, 1992, pretermination hearing, respondent's reliance on this incident, even though it had not replied in writing to appellant's grievance of his reprimand, was not improper.

Finally, appellant argues that the Racing Board violated his due process rights by giving him only two days, over a weekend, notice of the pre-disciplinary hearing and cites McCready/Paul v DHSS, Case No. 85-0216-PC (1981) at p 11, citing Cleveland Bd of Education v Loudermill, 470 U.S. 532, 105 S.Ct. 1497, 84 2 Ed 2d 494, 506 (1985), in support. Yet in Loudermill the Court said: "The essential requirement of due process... are notice and an opportunity to respond ...To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employer." Therefore, while respondent may have provided Higgins more time to prepare for his pre-disciplinary hearing, it cannot be concluded that he was not provided due process.

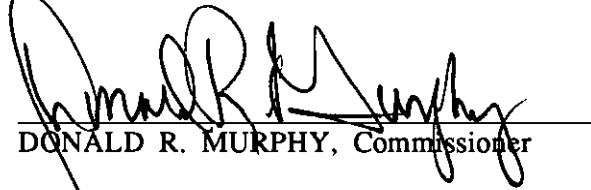
ORDER

The action of respondent in disciplining appellant is rejected and this matter is remanded to respondent for action in accordance with this decision.

Dated: January 11, 1994 STATE PERSONNEL COMMISSION

DRM/rlr


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

Parties:

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* Pursuant to the provisions of 1991 Wis. Act 269 which created the Gaming Commission effective October 1, 1992, the authority previously held by the Executive Director of the Wisconsin Racing Board with respect to the positions that are the subject of this proceeding is now held by the Chairperson of the Gaming Commission.